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Abortion Laws: The Perplexing Problem

Carl E. Wasmuth* and Kenet E. Chareau**

IMAGINE YOURSELF as a young woman who has to make the choice between life and death. If her pregnancy is permitted to continue,¹ she may risk her own life. If the pregnancy is interrupted, the fetus will die. Currently no uniformity of law exists.²

Under most statutes in various jurisdictions of the United States, a pregnant woman must bear the child, or seek surgical interruption through other than legitimate medical channels. Alarming, the majority of women who procure such abortions are married women with children.³

At the present time, it should be noted that there are two general categories of abortion. *Spontaneous Abortions*,⁴ without an affirmative or intentional act. *Induced Abortions* occur as a result of a direct and deliberate act intended to interrupt the pregnancy. Induced abortions are further categorized: Therapeutic Abortions are performed to save the life of the mother.⁵ Criminal abortions are those procedures performed outside the limits of the law, i.e., for any other reason than to save the life of the mother.⁶

This note presents a brief history of the common law relating to abortion, a definition of the current problem, and proposals for reform of the abortion laws.

Abortions: Common Law

Abortion is a surgical procedure practiced since the time of the Greek and Roman Empires.⁷ The two basic reasons for abortions were (1) to impede the overpopulation of the countries,⁸ and (2) to rid the country of illegitimates.⁹

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¹ *Natural birth* means allowing the pregnancy to develop in its own way, i.e., no abortion.

² See Table of Statutes, at end of this paper. See also, Louisell, *Abortion, The Practice of Medicine and Due Process of Law*, 16 U.C.L.A. Law Rev. 233 (1969).

³ Note, *Changing Abortion Laws in the United States*, 7 J. Family Law 496 (1967).

⁴ E. Ziegel and C. v. Blarcum, *Obstetric Nursing*, 150 (5th ed. 1964).

⁵ *Ibid.*, at 155.

⁶ *Id.*

⁷ Note, *An Analysis of the Proposed Changes to the Ohio Abortion Statute*, 37 Cinn. L. Rev. 340, 341 (1968).

⁸ *Ibid.*

⁹ *Id.*

The Christian world adopted Aristotle's philosophy of the three-stage soul: vegetable, animal, and rational.¹⁰ Under the canon law the abortionist was only punished when the fetus had acquired its rational soul.¹¹ It was not a crime to abort the fetus prior to the acquisition of the rational soul. It appears that the civil law, adopted in the eighteenth century, incorporated the canon law's policy with regard to abortions.¹²

The civil law disregarded the concept of the three-stage soul, adopting the new concept of "quickening." St. Thomas developed the theory that the soul entered into the fetus at the time of movement within the womb.¹³ The sole judge of the time of quickening was the mother.¹⁴ Under this concept it was a more serious crime to abort a woman after quickening than before.¹⁵ An abortion after quickening was considered by some to be a misdemeanor.¹⁶ Still other courts held that abortion after quickening was murder.¹⁷ An abortion prior to quickening was not a crime.¹⁸ Some courts took the position that an abortion was not a crime in the belief that life did not exist until the fetus was viable *outside* the mother.¹⁹

In 1803, the first statute on abortion was passed.²⁰ There seemed to be a tendency to inflict greater punishments on a "post-quickening" abortion than on a "pre-quickening" abortion.²¹ Probably this was due to the fact that after the fetus began to move, it was considered to be a living being;²² thus killing it would be murder. As may be inferred from the above discussion, the determination of whether the fetus had quickened or not was the crux of the whole controversy. Some common law jurists determined a fetus to be considered a being when the

... embryo had advanced to that degree of maturity designated by the term, "quick with child."²³

The ancients further say that a woman is not quick with child until "... she has herself felt the child alive and quick within her."²⁴

¹⁰ *Supra* note 3, at 503.

¹¹ *Ibid.*

¹² *Id.*

¹³ *Id.*; *supra* note 7 at 341.

¹⁴ *Supra* note 3. This would have to be implied, because early medical practices could not detect movement before the mother could. However, today it is possible for the doctor to know that the child is alive before the mother.

¹⁵ *Supra* note 7, at 342.

¹⁶ *Ibid.* at 341.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 342.

²⁰ *Id.*; also *supra* note 3 at 504.

²¹ *Supra* note 7 at 504.

²² *Ibid.*

²³ *Commonwealth v. Parker*, 9 Metc. (50-51 Mass.) 263 (1845).

²⁴ *Ibid.*

From the period of time before the Greek and Roman Empires to the time of the first statute on abortion, there evolved a set of elements for the common law crime of abortion:

1. the administration of drugs, or the use of instruments;
2. upon a woman;
3. quick with child;
4. with intent to destroy the child;
5. and that such was not necessary to save the life of the mother.²⁵

Abortion Laws: Current Status

When discussing the law pertaining to abortion, one must take cognizance of (1) the Religious Controversy; (2) the Statutory Provisions; and (3) the Medical Complications of Criminal Abortions.

1. *The Religious Controversy*: The Catholic Church opposes abortion in the belief that "because an unborn infant's soul does not have the benefit of baptism, an abortion caused him to die in eternal damnation."²⁶ To all rules, there are exceptions. An abortion will not be opposed if it is an incidental consequence of a treatment given to the mother.²⁷ Apparently the reason upon which this determination is based is that there is no *direct attack* on the child, but that the abortion resulted as an inevitable consequence. Therapeutic abortions are performed deliberately with the intent of killing the fetus: The Catholic Church is opposed to the performance of such procedures. To persuade non-Catholics to unite with the Catholic position, the Church argues that abortions "are the intentional murder of innocent children."²⁸

The positions of the Protestant religions vary. Most accept a "limited policy" towards abortions.²⁹ Most agree with progressive changes which are coming about in recent years.³⁰ The Orthodox Jewish religion permits abortions to save the mother's life only,³¹ the Reform takes a progressive stand³² and the Conservative branch supports protection for the mother.³³

2. *Statutory Provisions*: At the present, the abortion laws in the United States can be classified according to the following groups:

²⁵ *State v. Forte*, 222 N. C. 537, 23 S.E. 2d 842 (1943).

²⁶ *Supra* note 7, at 341.

²⁷ *Ibid.* at 342.

²⁸ *Id.* at 343.

²⁹ *Id.* at 343-44.

³⁰ *Id.* at 344.

³¹ *Id.*

³² *Id.*

³³ *Id.*

1. those which allow no abortion;³⁴
2. those which allow abortions only in certain circumstances.³⁵

Except for Louisiana, Massachusetts, New Jersey, and Pennsylvania, most other states allow abortions to be performed under certain conditions. All states, except for the four mentioned, provide for abortions to save the life of the mother.³⁶

The variant among the states in the latter category revolves around, who is the one to perform the abortion? A physician is required in eleven states.³⁷ The rest of the states do not expressly require a physician to perform the abortion, although a physician would be more competent. Another variant is concerned with the question, Is consultation necessary before performing an abortion? Thirteen states require the person or persons who are to perform the abortion to consult with one or more physicians.³⁸

Most abortion statutes refer to pregnancy rather than "quick with child." Under the concept of "quick with child," the abortion law would not apply until the mother had felt movement (about fourteen weeks of pregnancy).³⁹

In addition to the statutory prohibitions against abortions, there are administrative sanctions against physicians who perform illegal abortions. A majority of the states have license revocation statutes.⁴⁰

Six states have adopted the Model Penal Code and its provisions on abortion: Colorado, California, Georgia, Maryland, Mississippi, and North Carolina.⁴¹ Mississippi's law⁴² was expanded only to the extent that it permits an abortion to be performed when danger to the mother is imminent or the pregnancy resulted from rape or incest. The remaining five states adopted the provisions in the Model Penal Code (proposed Official Draft, 1962).⁴³

³⁴ La. Rev. Stat., Sec. 37.1285; Mass. Gen. L. Ann. ch. 272, Sec. 19 (1956); N.J. Rev. Stat. Sec. 2a; 87-1 (1953); Penn. Stat. Ann. Tit. 18, Sec. 4718 (1963).

³⁵ For a complete list of statutes by state, see B. James George, "Current Abortion Laws: Proposals and Movements for Reform," in *Abortion and the Law*, 7, n. 31 (1967).

³⁶ See Table of Statutes at end of this paper.

³⁷ D.C., Colo., Ill., Ark., Md., Miss., Mo., N.H., Ore., Wis. For complete list of statutes, see George, *op. cit. supra*, note 35, 7 n. 34.

³⁸ Ark., Fla., Ga., Kan., Md., Miss., Mo., Neb., Nev., N.M., Ohio, Tex., Wis. For complete list of statutes, see George, *op. cit. supra* note 35, 7 n. 41.

³⁹ Model Penal Code (tentative draft, 1959) Sec. 207.11, Comment.

⁴⁰ George, *op. cit. supra* note 35, at 16.

⁴¹ *Supra* note 3, at 497, n. 11; the footnote has been updated; new states are Georgia and Maryland.

⁴² Model Penal Code (Proposed Official Draft, 1962).

⁴³ *Supra* note 42.

3. *Medical Complications:* Drugs have been used in attempts to produce an abortion; however, most commonly, the women are aborted by inserting instruments into the uterine cavity. When this is performed in the hospital, the patient is taken to the operating room, and prepared in the same manner and under the same conditions as other surgical patients who are to undergo a surgical procedure. In most instances, the patient is anesthetized. The cervix of the uterus is forcibly dilated so that instruments (curette) can be inserted. The entire cavity wall is scraped in order to remove all elements of the pregnancy. Should serious hemorrhage occur, the uterine vault may be packed with gauze to be removed at a later time. Should it be necessary, agents such as oxytocics may be employed to cause uterine contraction. Hospitalization in most instances is limited to several days.

However, when abortions are produced by other than skilled physicians, complications may occur. As a rule, instruments such as catheters may be inserted into the uterine cavity. Unless performed under sterile conditions, they may result in infection leading to peritonitis and possibly death. Metallic instruments, when inserted, may rupture the wall of the uterus, enter the peritoneal cavity and cause hemorrhage and infection. Before the advent of antibiotics such complications in many instances terminated in death of the woman. The uterus containing a pregnancy is soft and friable. Large blood vessels are present which, if opened by instrumentation may cause serious hemorrhage or, air may enter causing an air embolism. If sufficient air enters the blood stream, when it reaches the heart, circulation may be interrupted and death ensue. Thus what may be considered a relatively minor operation necessitating limited period of hospitalization, may, when performed by less expert persons, become an extremely dangerous procedure, threatening the life of the woman.

Methods of general violence, such as jumping from heights, the carrying of heavy objects, horse-riding, etc., are occasionally resorted to in the hope of procuring an abortion. These methods are often combined with hot baths, or vaginal douches, but as a general rule they have no effect upon the continuing of the pregnancy.⁴⁴ To illustrate the seriousness of the complications following a criminal abortion, the following was presented by John F. King, at the Legal Conference for Medical Society Representatives:⁴⁵

John, a twenty-two year-old unskilled laborer, was sitting in his furnished room one Sunday afternoon when his girl-friend, Virginia, visited him. She announced that two days ago she had visited a gypsy woman for the purpose of obtaining an abortion. The gypsy, for ten dollars, had inserted a rubber catheter into her uterus and

⁴⁴ *Ibid.* at 741.

⁴⁵ Address by John F. King, Legal Counsel, Medical and Chirurgical Faculty of Maryland, Legal Conference for Medical Society Representative (Oct. 4, 1968).

had told her to walk around until bleeding commenced and the fetus was expelled. Nothing had transpired as yet. After the couple had consumed a few cans of beer, Virginia suggested that he attempt to pour water up the catheter, to see if this would produce the desired results. Failing to force any appreciable amount of water up the catheter Virginia suggested that John blow on the catheter. John blew vigorously, which had the effect of dislodging the catheter from the uterus into the upper vaginal canal and causing Virginia to lose consciousness and ultimately her life. John tried to revive her with cold compresses as her body jerked convulsively. Finally perceiving that she was dead, John hid Virginia's body in an upstairs closet and, in a panic, visited a series of bars while trying to decide what to do. Finally he visited a priest and confessed all. The priest induced him to go to the police.

Abortion Laws: Their Future

In a recent article, "Current Abortion Laws,"⁴⁶ one argument against liberalizing abortion is that it would create greater promiscuity. This, B. James George maintains, is a very weak argument and suggests that there are three alternative solutions:

1. Adoption of procedural changes which would make it difficult to convict doctors, who perform, in a hospital or clinic, dilatation and curettage, or other acceptable medical technique to terminate a pregnancy;
2. embodiment in the criminal code provisions of much broadened categories of therapeutic abortions, the performance of which is exempt from criminal prosecutions; or
3. complete elimination of criminal law regulation of therapeutic abortions, and in its place, establishment of regulation by the medical profession itself.⁴⁷

Neither the first or third alternative satisfies the needed reform. If the state legislatures removed the procedural requirements, lack of due process could be argued based on *Escobedo*⁴⁸ and *Miranda*.⁴⁹ Releasing or reducing the procedural requirements is not the answer to a complex problem.

In answer to the third alternative, the law requires an objective test, wherever it is possible or applicable. To allow such discretionary judgment to be placed with physicians might be delegation of powers far beyond the point that the medical profession wishes to assume or the law permits.

⁴⁶ *Supra* note 36.

⁴⁷ *Ibid.* at 23-24.

⁴⁸ 378 U.S. 478, 84 S. Ct. 1758 (1964).

⁴⁹ 384 U.S. 436, 86 S. Ct. 1602 (1966).

George's second alternative is perhaps an adaptable method of liberalizing the abortion laws. At present it is hard to establish the precise meaning of some statutes which provide that an abortion may be performed to preserve the health of the mother. What health?—the physiological health, or the mental health? Who knows? *Rex v. Bourne*⁵⁰ held that the words "preserving the life of the mother" should be interpreted to

... permit an abortion not only when death would be the probable result of the birth of the child, but also when the mental state of the woman indicates that her physical health will probably fail substantially or that she may commit suicide.⁵¹

As the *University of Cincinnati Law Review*⁵² points out, the court in the *Bourne Case* reasoned that:

words ought to be construed in a reasonable sense, and, if the doctor is of the opinion, . . . that the probable consequences of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury is quite entitled to take the view that the doctor under those circumstances is operating for the purpose of preserving the life of the mother.⁵³

The American Law Institute (authors of the Model Penal Code) distinguishes between types of abortion as being either

A. *Unjustified Abortion*: A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony . . .⁵⁴

B. *Justified Abortion*: A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. . . .⁵⁵

It should be noted that the Model Penal Code specifically includes mental health so as to prevent argument as to what "impair the health of the mother" really means, as is now the case with "preserve the health of the mother."

Even though the Model Penal Code permits abortions, they should be performed in a hospital, unless there are supervening circumstances.⁵⁶

⁵⁰ 1 K.S. 687 (1939).

⁵¹ *Supra* note 7, at 349.

⁵² *Ibid.*

⁵³ *Id.*

⁵⁴ Model Penal Code (Proposed Official Draft, 1962), Sec. 230.3(1).

⁵⁵ *Ibid.*, Sec. 230.3(2).

⁵⁶ *Ibid.*

It further requires a consultation and a certificate by at least two physicians, one of whom may be the physician performing the abortion.⁵⁷

The Model Penal Code presents the liberalizing approach which is needed in the country today without giving the criminal abortionist the opportunity to perform an abortion whenever he pleases. The Code calls for certain procedural requirements, even though these requirements are not hard to meet. With the adoption of the Model Penal Code permitting such procedures, the rigid rules and regulations of the reputable hospitals will be adequate to control any tendency to abuse of the statutory provisions.

Statutory Provisions Presently Enacted in the United States⁵⁸

(See Explanatory notes, below)

State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
ALA						X									
ALAS	X														
ARIZ		X													
ARK		X													
CALIF									X		X				1967
COLO									X	X	X				1967
CONN			X												
DEL	X														
D.C.						X									
FLA	X														
GA									X	X	X	(effective 7/69)			
HAWAII		X													
IDA	X														
ILL	X														
IND	X														
IOWA		X													
KAN	X														
KEN	X														
LA														X	
ME	X														
MD									X	X	X				1968
MASS												X			
MICH	X														
MISS	X										X				1966
MO			X												
MON	X														
NEB	X														
NEV			X												
N.H.	X														
N.J.													X		
N.M.					X										

⁵⁷ *Id.*

⁵⁸ Material used from Law Division, American Medical Association. However, the material was received as only as of May, 1968, so the statutes as of May, 1969 were checked and entered on the chart. The categories are those prepared by the AMA.

State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
N.Y.			X												
NO.CA.								X		X	X				1967
NO.D.	X														
OHIO	X														
OKLA	X														
ORE						X									
PA												X			
RI	X														
SO.C.			X												
SO.D.	X														
TENN	X														
TEXAS		X													
UTAH	X														
VT	X														
VA				X											
WASH			X												
W.V.				X											
WIS		X													
WYO	X														

[Material used from report from Law division, American Medical Association. Material updated to May 1, 1969; See explanatory notes, below]

Explanatory Notes

1. Abortion permitted to preserve the life of the mother.
2. Abortion permitted to save the life of the mother.
3. Abortion permitted to preserve the life of the mother or that of the child.
4. Abortion permitted to save the life of the mother or that of the child.
5. Abortion permitted to preserve life of the mother or prevent serious bodily injury.
6. Abortion permitted to preserve the life or health of the mother.
7. Abortion permitted to secure the safety of the mother.
8. Abortion permitted to preserve the health of the mother.
9. Abortion permitted to preserve the physical or mental health of the mother.
10. Abortion permitted to prevent birth of child with grave physical or mental disease or deformity.
11. Abortion permitted when pregnancy resulted from rape, incest or other felonious intercourse.
12. Wilful or unlawful abortion is a crime, without any specific exception.
13. Any abortion which is malicious or without justification is a crime.
14. No exception to crime of abortion is set forth in statute.
15. The year in which the Model Penal Code, proposed official draft's abortion laws were adopted. (This also includes those states which enacted the code in part.)

[Editor's Note: "Abortion" in medical terms means only termination of pregnancy prior to the full term (not necessarily death of the child).]